CONSTITUTIONAL LAW- STATE REGULATION OF HOURS OF LABOR - POLICE POWER AND DUE PROCESS

Michigan Law Review

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Constitutional Law — State Regulation of Hours of Labor — Police Power and Due Process — A South Carolina statute¹ prohibited labor of employees in enumerated manufacturing and mercantile establishments for more than fifty-six hours per week or more than twelve hours in any one day. Plaintiffs were druggists who brought suit to restrain the commissioner of labor from enforcing the statute. A temporary restraining order was issued and the commissioner of labor appealed. *Held*, the statute was un-

¹ S. C. Acts (1938), No. 943.
constitutional as in violation of the due process and equal protection clauses in both state and federal constitutions. *Gasque, Inc. v. Nates*, (S. C. 1939) 2 S. E. (2d) 36.

The recent tendency of the United States Supreme Court has been to uphold similar social legislation as a valid exercise of the police power. In holding the statute to be an improper exercise of the police power, the case seems out of line with this trend. Courts have generally upheld statutes regulating maximum hours of (a) women and children, (b) state employees, (c) persons engaged in dangerous occupations where the general welfare of the workers in those occupations is a matter of serious public concern, and (d) persons in occupations where continuous employment for long hours might be dangerous to the public at large. The real difficulty arises when the statute prescribes a general blanket regulation of industry. In 1917 the Supreme Court upheld an Oregon statute limiting the hours of labor in mills, factories and manufacturing establishments to ten hours per day. But there is no degree of uniformity in the state courts. The difference between regulation of men and women lies only in the degree of necessity. It follows that the legislature should be allowed a considerable amount of discretion in determining the need for maximum hour legislation. Thus on principle it is submitted that any regulation of the maximum hours of labor, unless it is arbitrary or capricious, should be upheld as a valid exercise of the police power. In several of the late cases a new factor has been introduced. There is a growing recognition that many of the statutes were enacted not as health measures but with the purpose

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5 Holden v. Hardy, 169 U. S. 366, 18 S. Ct. 383 (1898), upholding a statute regulating mines, smelters, and refineries.

6 In *re Twing*, 188 Cal. 261, 204 P. 1082 (1922), upholding a statute regulating employees in drug stores on the theory that putting up prescriptions under fatigue endangers the public at large. Most states have statutes regulating truck drivers, for everyone realizes that a sleepy truck driver endangers the public at large. *H. P. Welch Co. v. State*, 89 N. H. 428, 199 A. 886, 120 A. L. R. 282 at 295 (1938).


9 State v. Bunting, 71 Ore. 259 at 271, 139 P. 731 (1914).

10 This is the view taken by most of the leading writers on the subject. See Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 *Harv. L. Rev.* 353 (1916); Hand, "Due Process of Law and the Eight-Hour Day," 21 *Harv. L. Rev.* 495 (1908).
of spreading employment. This was held to be a proper legislative purpose in a recent Montana decision.\textsuperscript{11} The statute in the principal case has more of the characteristics of a health measure,\textsuperscript{12} but it has the incidental effect of spreading out employment as well. It might have been upheld on either basis. However, the result the court reached can be justified on the ground that the statute denied certain classes of people equal protection of the laws. In making a general blanket regulation and then providing for certain excepted industries, there is always a danger that the legislature will make an arbitrary classification. It is proper to make a classification if there is some reasonable basis of distinction, but the statute in the principal case appears to have been clearly arbitrary. From a glance at the parallel columns of businesses regulated contrasted to those not regulated\textsuperscript{13} the discrimination between different classes is made apparent. Thus laundries were exempted but dry cleaning establishments were regulated. Eating places in connection with hotels were exempted while private restaurants were regulated. The statute bears the marks of pressure exerted by particular groups upon the legislature. At any rate, it was not successfully shown before the court that there was a logical basis for the classification.\textsuperscript{14}

\textsuperscript{11} State v. Safeway Stores, Inc., 106 Mont. 182 at 201, 76 P. (2d) 81 (1938): “No one can say positively whether the Act was passed in an attempt to adjust unemployment by creating more jobs, to promote health, or whether it was simply for the general prosperity and welfare of the state as a whole. The object may well have been a combination of all such purposes. We are not called upon to say precisely what the object really was, so long as any of these purposes might reasonably have been accomplished by the Act.” See also Nebbia v. New York, 291 U. S. 502 at 537, 54 S. Ct. 505 (1934): “a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. . . .”


\textsuperscript{12} The statute in Bunting v. Oregon, 243 U. S. 426, 37 S. Ct. 435 (1917), provided for a 10-hour day and was held to be a health measure. The statute in the principal case partakes more of a health measure for it does not contain the more drastic limitations of other state statutes.

\textsuperscript{13} Principal case, 2 S. E. (2d) at 43.

\textsuperscript{14} On the validity of ordinances regulating closing hours of stores and shops, see note 36 Mich. L. Rev. 850 (1938).